

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

STATE OF NEW MEXICO, *ex rel.*
State Engineer, *et al.*,

Plaintiffs,

v.

EDUARDO ABEYTA, *et al.*, and
CELSO ARELLANO, *et al.*,

Defendants.

69cv07896 BB
RIO TAOS ADJUDICATION

69cv07939 BB
RIO HONDO ADJUDICATION

(CONSOLIDATED)

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court *sua sponte*.

The procedure for determining subfile priority dates begins after the State makes offers of judgment based on its research of earliest first use on each ditch. (*See* Mem. Op. and Order at 10, Doc. No. 3026, filed May 13, 2002). Acequias and individual claimants are then given an opportunity to prove an earlier date. (*See id.*). After ruling on any objections, the Court applies the acequia-wide priority date to the individual water rights the acequia serves. After the Court enters an order setting the right as between the State and the claimants, parties may challenge other claimants' rights in the *inter se* phase. (*See id.* at 2).

This Memorandum Opinion and Order addresses the priority dates for the Des Montes Ditch and its laterals Acequia del Llano and Mariposa Ditch. (*See* State's Motion for Extension of Time and Status Report on Identification of Des Montes Subfiles at 3, Doc. No. 5138, filed September 10, 2008). On September 11, 1989, the Court ordered each of the defendant water rights owners to show cause why the Court should not enter a judgment declaring their water rights priority date as set forth

in the State's offers, subject to *inter se* claims. (See Doc. No. 1641)(Campos, C.J.). The State served a notice of the Court's Order to Show Cause offering priority dates of 1815 for Des Montes Ditch, 1898 for the Acequia del Llano and 1907 for Mariposa Ditch. (See Certificate of Service at 6-8, Doc. No. 1645, filed September 18, 1989; Certificate of Service at 2, Doc. No. 1871, filed December 5, 1989). The Acequia del Llano and Mariposa Ditch, filed objections to the offered priority dates. (See; Mariposa Ditch's Objections to Order to Show Cause, Doc. No. 1671, filed October 11, 1989, Doc. No. 1722, filed October 23, 1989; Acequia del Llano's Objection to Order to Show Cause, Doc. No. 1721, filed October 23, 1989).

Special Master Zinn heard the objections and filed his Special Master's Report on July 23, 1993 (Doc. No. 2143). The Special Master subsequently found that Des Montes Ditch had two priority dates, August 7, 1815 and July 27, 1829, and that both Acequia del Llano and Mariposa Ditch had a priority date of August 7, 1815. (See Special Master's Report at 19, Doc. 2143, filed July 23, 1993). The Des Montes Ditch filed objections to Special Master Zinn's recommendations. (See Des Montes Ditch's Objections to Report of the Special Master, Doc. No. 2150, filed August 5, 1993). Des Montes Ditch requested that the priority date for the entire Des Montes ditch be fixed at 1815. (See *id.*). Before the Court ruled on their objections, the Rio Hondo acequias, which include Des Montes Ditch, requested that the Court stay any rulings on Rio Hondo priorities to give them an opportunity to negotiate a water-sharing agreement. (See Doc. No. 4384 at 1, filed January 28, 2004). The Court granted the request to stay any rulings on Rio Hondo priorities. (See Doc. No. 4419 at 4, filed February 19, 2004).

On July 7, 2008, the Court adopted the priority dates stipulated by the Rio Hondo acequias. (See Doc. No. 5112 at 2). The Court adopted the stipulated priority date of August 1815 for

Mariposa Ditch and had previously adopted the Special Master's undisputed finding of August 7, 1815 as the priority date for the Acequia del Llano. (*See id.*; Doc. 5059, filed April 4, 2008). The Rio Hondo acequias stipulated two priority dates for the Des Montes Ditch. (*See* Doc. No. 5112 at 2). The Court ordered the State to identify which subfiles served by the Des Montes Ditch should have an August 1815 priority date and which should have an 1829 priority date. (*See id.*). The Court also ordered the State to "include in the notice a description of its basis for determining which of the two priority dates each of the subfiles should have." (*Id.*).

The State filed its Notice of Identification of Des Montes Subfiles (Doc. No. 5152) on October 10, 2008. The State, and the Des Montes, Mariposa, Acequia del Llano, and Rebalse Community Ditch Associations agreed that all subfiles served by the Mariposa Ditch and 11 subfiles served by the Acequia del Llano should have a priority date of 1829, and that the remaining 17 subfiles served by the Acequia del Llano and all the subfiles served by the Des Montes Ditch should have a priority date of August 1815. (*See* Notice at 1-2, Exhibits 1-2, Doc. No. 5152, filed October 10, 2008). The acequias reached "an agreement on the amount of acreage served by the Des Montes Ditch to be allocated an 1829 priority, and the amount to be allocated an 1815 priority" during mediation, in which the State participated, "in the interest of implementing the water-sharing agreement entered into by all the Rio Hondo Acequias." (Doc. 5138 at 2, filed September 10, 2008). The State's Notice does not, however, describe the basis for determining which of the subfiles should have an 1829 priority date. The Notice does not indicate whether the owners of those subfiles have agreed to an 1829 priority date. *See Kothe v. Smith*, 771 F.2d 667, 669 (2nd Cir. 1985) (a court cannot coerce a party to settle). Consequently, the Court cannot adopt a priority date of 1829 for those subfiles identified in the Notice.

Accordingly, the Court will assign a ditch-wide priority date of August 1815 to the Des Montes Ditch and its laterals Acequia del Llano and Mariposa Ditch. (*See* Des Montes Ditch's Objections to Report of the Special Master, Doc. No. 2150, filed August 5, 1993)(requesting that the priority date for the entire Des Montes ditch be fixed at 1815). The Court's previous Order (Doc. No. 5059, filed April 4, 2008) adopting the priority date of August 7, 1815 for the Acequia del Llano is vacated. The issue of which subfiles served by the Des Montes Ditch should have a priority date of 1829 rather than August 1815 can be addressed during the *inter se* proceedings. The acequia-wide priority date does not apply to supplemental irrigation wells or springs, nor does it apply to individual subfile water rights previously denied. All water rights claims previously denied have a priority date of "None."

The following are the final ditch-wide priority dates for all valid surface water rights in the Rio Hondo Section of the Rio Pueblo de Taos Stream System subject to *inter se* proceedings:

<u>Ditch Name</u>	<u>Priority Date</u>	<u>Order Adopting Priority Date</u>
Acequia de Atalaya	1825	Doc. No. 5112, filed July 11, 2008
Acequia de la Plaza	April 1815	Doc. No. 5112, filed July 11, 2008
Acequia de San Antonio	1823	Doc. No. 5112, filed July 11, 2008
Acequia de Llano	August 1815	Adopted herein
Acequia Madre del Llano	April 1815	Doc. No. 5112, filed July 11, 2008
Cañoncito North	1823	Doc. No. 5112, filed July 11, 2008
Cañoncito South	1823	Doc. No. 5112, filed July 11, 2008
Des Montes	August 1815	Adopted herein
Gallina	March 8, 1893	Doc. No. 3102, filed February 21, 2003
Hawk	1887	Doc. No. 3102, filed February 21, 2003
Mariposa	August 1815	Adopted herein
Prando	1823	Doc. No. 5112, filed July 11, 2008
Rebalse	August 1815	Doc. No. 5112, filed July 11, 2008
Washam	March 18, 1907	Doc. No. 4202, filed August 8, 2003.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bruce D. Black". The signature is written in a cursive style with a large, stylized "B" and "B".

BRUCE D. BLACK
UNITED STATES DISTRICT JUDGE